LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 18 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 699

NATHAN SHARFF,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VAN RIPER & BELMONT
Counsel for Petitioner
744 Broad Street
Newark, New Jersey

SHELDON LOWE
Of Counsel

32 CASE PRESS INC., 421 Hudson St., N.Y.—OREgon 5-4540

INDEX

	PAGE
Citations to Opinions Below	1
Jurisdiction	1
Questions Presented for Review	2
Constitutional and Statutory Provisions Involved	2
Statement	4
Reasons for Granting the Writ	9
Conclusion	18
Appendix A—Opinion of United States Court of Appeals	A-1
Appendix B—Docket Entries	A-13
Appendix C—Judgment of the United States Court of Appeals	A-18
Appendix D—Order Denying Petition for Rehearing, etc.	A-20
Appendix E—Order Denying Petition for Rehearing In Banc	A-22

Authorities Cited

PAGE

Cases

Abbott v. United States, 239 F. 2d 310 (5 Cir. 1956) ... 9, 11
Beavers v. Haubert, 198 U.S. 77, 49 L. Ed. 950, 25 S. Ct. 573 16
Berkowitz v. U.S., 90 F. 2d 881 (8th Cir. 1937) 16
Crawford v. United States, 212 U.S. 183 (1909) 17
Delvalley v. United States, 88 F. 2d 579 (7th Cir. 1937) 17
Hanks v. United States, 97 F. 2d (4th Cir. 1938) 17
Outlaw v. United States, 81 F. 2d 805 (5th Cir. 1936), cert. denied, 298 U.S. 665 (1936) 17
People v. Hermens, 5 Ill. 2d 277, 125 N.E. 2d 500 (1955) 17
Pollard v. U.S., 352 U.S. 354, 1 L. Ed. 2d 393, 77 S. Ct. 481 (1957) 17
Pratt v. U.S., 102 F. 2d 275 (D.C. Cir. 1939) 16
U.S. v. Aviles, 274 F. 2d 179 (2nd Cir. 1960) 16
United States v. Bottone, Salb, and Sharff, F. 2d (2d Cir., decided August 4, 1966) 5
United States v. Lester, 282 F. 2d 750 (3 Cir. 1960) .9, 10, 11
United States v. Seagraves, 265 F. 2d 876 (3 Cir. 1959) 9, 10, 11

Statutes

18 U.S.C. §371 4
18 U.S.C. §2311 .....3, 4, 7, 10, 11
18 U.S.C. §2314 .....2, 3, 4, 7, 9, 10, 14
18 U.S.C. §2315 ..... 4, 7

United States Constitution

Fifth Amendment 2

Federal Rules of Criminal Procedure

Rule 32 16

IN THE

Supreme Court of the United States

October Term, 1966

No.

NATHAN SHARFF,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on August 4, 1966. Rehearing was denied September 20, 1966.

Citations to Opinions Below

The opinion of the Court of Appeals is not yet reported and is printed as Appendix A.

Jurisdiction

The judgment of the Court of Appeals was entered on August 4, 1966. Rehearing was denied on September 20, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

Questions Presented for Review

1. Did the Court below err in ruling that the evidence was legally sufficient to establish that the cultures and documents here involved were of the value of $5,000. or more within the meaning of 18 U.S.C. Sec. 2314?

2. Did the Court below err in ruling that the transportation of copies of papers describing the Lederle processes constituted the transportation in interstate or foreign commerce of "goods" which had been "stolen, converted or taken by fraud" within the meaning of 18 U.S.C. Sec 2314?

3. Where co-defendants pleaded guilty and their sentencing was deliberately delayed at the behest of the government for three years and until after they had testified against petitioner, was petitioner deprived of a fair trial under the Fifth Amendment to the Constitution?

4. Whether it is permissible for a Federal judge to impose a more severe sentence upon a criminal defendant because he has exercised his constitutional right to plead not guilty and stand trial.

Constitutional and Statutory Provisions Involved

The constitutional provision involved is the Fifth Amendment to the United States Constitution. It is printed in 1 U.S.C. XLVI and is as follows:

ARTICLE [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for

the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 2311 and 2314 of Title 18 U.S.C., which, so far as here relevant, read as follows:

"Sec. 2311. Definitions

"As used in this chapter:

* * * * *

"'Value' means the face, par, or market value, whichever is the greatest, and the aggregate value of all goods, wares, and merchandise, securities, and money referred to in a single indictment shall constitute the value thereof."

"Sec. 2314. Transportation of stolen goods, securities, monies, or articles used in counterfeiting.

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited; or

"Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both. * * *"

Statement

Petitioner Nathan Sharff seeks review of a judgment entered on January 20, 1966 in the United States District Court for the Southern District of New York[1] (METZNER, *J.* presiding), and affirmed on August 4, 1966 by the United States Court of Appeals for the Second Circuit (rehearing denied September 20, 1966).

The indictment against petitioner Sharff and others contained several charges relating to the illegal transportation of stolen drug secrets in interstate and foreign commerce.[2]

---

[1] The United States District Court had jurisdiction over the matter because petitioner was charged with violating federal criminal statutes viz., Title 18, U.S. Code, sections 2, 2314, 2315, and 371.

[2] Indictment 64 Cr. 648, filed on July 13, 1964 named as defendants Caesar Bottone, John Cancelarich, Leonard Fine, Sidney Martin Fox, Seymour Salb, Nathan Sharff, and three other individuals who were not tried and who are unimportant in the context of this appeal.

The indictment contained eleven counts, of which appellant was charged with four, viz., 1, 8, 9, and 10. Counts 1 and 9 charge appellant with violation of Title 18, U.S. Code, sections 2 and 2314. Count 8 charges petitioner with violation of Title 18, U.S. Code, sections 2 and 2315, and Count 10 charges him with conspiracy (Title 18, U.S. Code, section 371) to violate these sections.

The present indictment supersedes an earlier indictment (62 Cr. 963) filed on October 29, 1962 which contained substantially the same charges and which issued against Joseph Gerace and all those named in the 1964 indictment except Salb (and one Maurice Rosenblatt). On December 21, 1962, defendants Cancelarich and Fine pleaded guilty to all 5 counts of the 1962 indictment and on January 11, 1963, Gerace did likewise. On November 2, 1964, defendant Fox pleaded guilty to all 9 counts with which he was charged in the present indictment, viz., Counts 1 through 7, and 10 and 11. Sentencing of these four defendants was held in abeyance pending the trial of defendants Bottone, Salb, and Sharff. (A motion by Salb and Sharff, who stood trial, to have the defendants who pleaded guilty sentenced before the trial, was denied.)

"The enterprise that was the subject of this indictment involved stealing and preserving cultures Lederle had developed, temporarily removing and copying documents that outlined manufacturing procedures, and then selling the cultures and the copies primarily for ultimate exportation to Europe." *United States* v. *Bottone, Salb, and Sharff,* F. 2d . (2d Cir., decided August 4, 1966) at 3056-3057. Seymour Salb, Caesar Bottone, and Nathan Sharff "did not steal the processes or the cultures" (R. 2873); they were "on the receiving end." *United States* v. *Bottone et al.* at 3057.

As regards the cultures, the evidence in fact showed that Wawretschek, who was founder and administrator of the Milan firm of Ankermann, constantly complained that the cultures he received from Biorganic (a company operated by Salb and Sharff) did not work out very well; that he was "never satisfied" with the yields he obtained from them; and that the cultures delivered to Ankermann in May 1961 by Cancelarich, following his April 16 trip (the subject of count 8) were valueless, since they produced yields less than those which Ankermann already had (682, 688, 733, 863-4, 867-8, 1224). It further appeared that Wawretschek wanted to rescind his agreement to purchase organisms from Sharff and Salb (2341-2), and that he was ready to "throw them out of Ankermann" (Ex. 137, 1423).

As regards the "documents," the Government's own expert witness from Lederle, Dr. Scholz, made clear the necessity for precision in the writing up of the processes involved in order for them to have any value. He thus testified that the processes for production of these antibiotics had to be followed so precisely in order to achieve the desired results that "differences of one degree in temperature would make

a substantial difference" to success in production (1952-53, 2043). Dr. Scholz further testified, as to the value of the information supplied to a potential commercial producer of these antibiotics, as follows (1803-04):

> "Well, when you consider value, one must include not only the items which I mentioned as being in the standard SOP which were not in the literature, but must also consider the entire text. And this is because a commercial process such as this is not something that depends on a simple trick or even an outstanding technical advancement. It depends on the careful and painstaking attention to all the details of the process day after day, doing it exactly the same way—the supplier of the raw material, the exact amounts, the complete listing of raw materials, the way in which the equipment is handled—this must be done in a consistent fashion, day in and day out. So that it's a combination of all these factors which contribute to the value of such document and which would be of immediate value to someone wishing to start on an equal footing with American Cyanamid in the manufacture of DMCTC, because by having this they would obviate the extensive and time-consuming techical work that went into the preparation of that document.
>
> "Now I am mentioning this with respect to Exhibit 73, but it should equally well apply to the other part of the DMCTC operating instruction which was the fermentation procedure, Exhibit 29."

The testimony of Fox, who wrote up substantial numbers of the "documents" involved herein, made equally clear the imprecision and generality with which he did so (323-4, 363-5, 880), and the lack of value in such "documents" was further confirmed by the unsuccessful results of which

Wawretschek complained, as above noted. Indeed, it appeared that Wawretschek had complained that all he had received were cultures which had come from a public depository and processes which had been taken from public literature (2429).

The eighth count charged the petitioner herein with the unlawful transportation on or about April 16, 1961, from New York to Rome, Italy, of stolen "goods, wares and merchandise, of a value of $5000 and more", consisting of certain microorganisms and "documents relating to the production" thereof. The tenth count charged the petitioner herein with having unlawfully conspired to commit offenses in violation of 18 U.S.C. Secs. 2314 and 2315, involving the unlawful transportation in foreign commerce, and receipt and disposition thereafter, of "stolen goods of a value of $5000 and more", consisting of specified microorganisms and "documents relating to the production" thereof.

Although at first the Government's position appeared to be that those documents were "the Lederle documents detailing the processes to be used to manufacture these drugs", and not intangible "know-how" (94, 903-904), it developed at the trial that of the thousands of pages of documents (including microfilm) put in evidence, none except one of these was a photostat of a "Lederle" document (877). The remainder of the so-called "Lederle documents" put in evidence, consisted in part of write-ups, by Fox, Fine and Cancelarich, in which they included abstracts of such documents and, in substantial part, write-ups in Fox's, Fine's and Cancelarich's own language, based in part upon the Lederle documents and in part upon their own experience.

For example, among the documents admitted in evidence against the defendants on Counts 8 and 10 of the indictment were incomplete, undetailed procedures on triamcinolone written up by Fox, from which "one could develop a good procedure for tramcinolone" (323-324). Fox also "prepared a fermentation procedure for chlortetracycline" (CTC) (363), not the Lederle procedure. Following delivery of that procedure, Fox "clarified" that procedure to Sharff by showing him "what I (Fox) wanted in the procedure" (364-365). It was also shown by the testimony of the Government's "expert" witness, Dr. Scholz (1936), that a scientist such as Dr. Fox, by reason of his extensive training at Lederle and elsewhere would normally be able to retain by memory the critical and economically useful details pertaining to the secret processes used by Lederle in the production of DMCTC, TC, CTC and triamcinolone. His duties at Lederle required him to be aware of the developments in all fields.

Fox thus could, as he apparently did, interpolate extensively into his write-ups, factors derived from his own "know how" in this field. Fox identified Government Exhibits 27 and 28 as procedures prepared by him and Cancelarich (406). He identified Government's Exhibit 29 through 33 as containing abstracts from Lederle documents and written up by him and Cancelarich at Fox's house (407-410). Exhibit 78 was a triamcinolone procedure prepared by Fox "from my own knowledge and also using microfilm (of Lederle reports) which I had available at that time" (880). In addition, the procedures written up by Fox, Fine and Cancelarich were not in the same language as appeared on those documents but in their own

language (e.g., 1055-56). Exhibits 27, 29, 31 and 78 were among the documents carried to Italy by Cancelarich on April 16, 1961 (407-410, 876-876a).

In short, as the Government acknowledged, the thrust of the testimony of the witnesses Fox and Cancelarich, as to the preparation of the procedures they wrote up, was that they took the Lederle documents, read or made photostats or microfilm copies of them at home, and, after reading them, prepared their own procedures and returned the originals (901-902, 1840).

Reasons for Granting the Writ

Petitioner believes this case presents important and novel questions in the administration of the criminal law, particularly in the interpretation of 18 U.S.C. Sec. 2314, which have not been and should be decided by this Court. Moreover, the Court below in determining one of the questions herein presented elected to follow Third Circuit holdings which are in conflict with a Fifth Circuit holding which supports petitioner's contention.

1. The Court below, in holding that the evidence was sufficient to establish that the cultures and documents here involved were of the value of $5,000. or more, held that it was proper to consider evidence of value in a "thieves' market" and the cost of developing the cultures. In doing so, it elected to follow Third Circuit holdings in *United States* v. *Seagraves*, 265 F. 2d 876 (3 Cir. 1959), and *United States* v. *Lester*, 282 F. 2d 750 (3 Cir. 1960), cert. denied 364 U.S. 937 (1961), and rejected a contrary Fifth Circuit holding in *Abbott* v. *United States*, 239 F. 2d 310, 312-313 (5 Cir. 1956).

The statute, 18 U.S.C. Sec. 2314, makes it a federal offense to transport goods across state lines only if they have a "value" of $5,000. or more and 18 U.S.C. Sec. 2311 prescribes the exclusive criteria for such value. In the *Abbott* case, *supra,* involving a prosecution for the unlawful transportation of photostats of geophysical maps, the Fifth Circuit held that the prosecution had failed to establish the essential element of value of $5,000. or more because of its failure to show either a market, or a market value, for the materials involved, as required by 18 U.S.C. Sec. 2311. That court further held that it was error to permit testimony, on the question of value, as to the cost for the geophysical exploratory work represented by the maps "or its 'value' to oil lease traders and promoters working up trades for that area", since even if such evidence served to show "intrinsic or actual value, . . . it was certainly not market value . . ." (239 F. 2d 312). The Court further stated (239 F. 2d 313):

> "Congress plainly restricted value to three well-understood standards. Mere cost of production, cost of replacement, value to the owner, value to one who might have use of it under certain special circumstances, whatever else it might be, is not market value. For that value—market—depends on a market, whether formal or informal, in which willing buyers bargain with willing sellers."

While the Third Circuit held in *United States* v. *Lester, supra,* that "any reasonable method" could be employed to determine the value of an item not having a market value and earlier held in *United States* v. *Seagraves, supra,* that the price paid by the defendants themselves could be thus considered, it is submitted that the holding of the Fifth

Circuit in the *Abbott* case, *supra,* is more in consonance with the language of the governing statute and with reason and should be followed.

The price offered for stolen property in a thieves' market, by a receiver thereof, does not constitute evidence of market value as defined in Section 2311. Testimony that a stolen diamond was sold for $3500. to a fence would, according to the opinion, constitute value in a thieves' market. Thus, if it were the only testimony offered on value, it would bar conviction even though the diamond had a market value of $10,000. On the other hand, a good imitation of a diamond which can be bought in the diamond market for about $500 and which was sold in a thieves' market by misrepresentation as an actual diamond for $5,000, would then sustain a conviction. These examples hardly establish market value as defined in Section 2311, upon which prosecutions may be sustained.

The Court below states (App. A, page 7):

> "Neither do we have any concern over the value of these papers, since we dismiss out of hand the contentions that secret processes for which European drug manufacturers were willing to pay five and six figures and in whose illicit exploitation appellants eagerly invested a large portion of their time and an appreciable amount of their fortunes were not worth the $5,000, required to subject them to federal prosecution. . . ."

There was no competent proof submitted that European drug manufacturers were willing to pay five and six figures for the secret processes. The only testimony on this subject came from Fox and Cancelarich and related to

alleged conversations had with European buyers. These conversations were not in the presence of any of the defendants on trial and were not in furtherance of Count 10, the conspiracy charged herein. These conversations were pure hearsay and inadmissible. Proper objection and motion to strike were made (2166).

The fact that the defendants made a substantial investment in Ankermann also does not constitute proof of the value of the cultures allegedly received by Ankermann from Cancelarich. Cancelarich testified that as far as he knew, the Ankermann deal was perfectly legitimate (1294). There was a failure of proof as to whether the actual cultures stolen from Lederle were transported to Ankermann. Cancelarich testified (844) that the stolen cultures were given to a Dr. Weinstein for "relyophilization". Dr. Weinstein was not called as a witness to prove that the stolen cultures or the lyophilized strains thereof were the ones returned to Cancelarich. There is no proof of what Dr. Weinstein returned to Cancelarich. In fact, Fine testified that he received six different cultures from Weinstein (1499). Further, if the stolen Lederle cultures were good productive ones, then these were not the same as those given to Ankermann. Both Cancelarich and Wawretschek complained that these cultures were failures (688, 1224). What is the value of a culture that is a failure?

2. The Court below, in holding that the transportation of papers describing the Lederle processes constituted the transportation in interstate or foreign commerce of "goods" which had been "stolen, converted or taken by fraud" within the meaning of 18 U.S.C. Sec. 2314, recognized that a "serious question" and "serious point of

law" had been raised (App. A, pp. 6, 7). In holding as it did, the Court below cited no direct authority, nor has diligent research disclosed any such authority. Thus this case presents an important and novel question in the administration of the criminal law which has not and should be decided by this Court.

The Court below acknowledged that there was a "lack of proof that any of the physical materials . . . came from Lederle's possession". It found that the standard procedure was for Fox and Cancelarich to remove documents from Lederle's files at Pearl River, N. Y., take these to Fox's home within New York State, make photocopies, microfilms or notes, and then restore the purloined papers to Lederle's files. It developed at the trial that of the thousands of pages of documents, including microfilm, put in evidence, none except one of these was a Lederle document (877). The remainder of the Lederle documents put in evidence consisted in part of write-ups by Fox, Fine and Cancelarich, on which they included abstracts of such documents and, in substantial part, write-ups in their own language based in part upon the Lederle documents and in part upon their own knowledge and experience. Thus what were transported in interstate and foreign commerce were not documents which were the property of Lederle, having been made in its office, on its paper and with its equipment, as in the *Seagraves* and *Lester* cases, *supra*, but documents prepared by and belonging to Fox, Fine and Cancelarich, and were at most their own copies or summaries of Lederle procedures. It is submitted that even to the extent that these writings contained intangible "trade secrets" or ideas stolen from

Lederle, such intangibles are not within the ambit of "goods, wares and merchandise" as those terms are used in 18 U.S.C. Sec. 2314. The Court below, without citing authority, concluded otherwise.

The Court below conceded that 18 U.S.C. Sec. 2314 "would presumably not extend to a case where a carefully guarded secret formula was memorized, carried away in the recesses of a thievish mind and placed in writing only after a boundary had been crossed". It held, however, that where the "physical form" of that which is stolen is of secondary importance to the matter therein recorded, the transformation of the information in the stolen papers into another tangible object should be deemed immaterial where the latter is transported in interstate or foreign commerce. Thus, if a scientist like Fox each day memorized some particular procedure and each night at home prepared notes therefrom so that he accumulated notes of a complete procedure and transported these notes from New York to New Jersey, a violation of the statute would occur. If, on the other hand, he lived in New Jersey and not New York, and compiled his notes in the same manner, a violation would not occur. It is submitted that this interpretation of the statute offends common sense and reason.

3. In July, 1964, the indictment (64 CR. 648) was returned in the Southern District of New York charging the petitioner, along with eight co-defendants, with various violations of the United States Code. The aforesaid indictment superseded in some respects an indictment returned in October, 1962 in the same District (62 CR. 963). In 1962, John Cancelarich and Leonard Howard Fine pleaded guilty to all counts in the 1962 indictment in which they were

named. In January, 1963, Joseph Gerace pleaded guilty to all counts in which he was named in the 1962 indictment. In October, 1964, Sidney Martin Fox pleaded guilty to all counts in which he was named in the 1964 indictment. None of the four was sentenced until after completion of the trial of the petitioner. On October 1, 1965, prior to the fixing of a trial date, the petitioner moved in the United States District Court for the Southern District of New York for an order directing that sentence be imposed upon Cancelarich, Fine, Gerace, and Fox before the trial of the 1964 indictment or, in the alternative, for an order directing that the testimony of the four men be suppressed and that they be prohibited from testifying on behalf of any party in the trial of the indictment (App. B, p. A-10). Thereafter on November 5, 1965, and before trial, the court denied the motion (App. B, p. A-17). On December 15, 1964, the government marked the sentence of Fox off the calendar and on December 28, 1964, the government marked the sentences of Cancelarich, Gerace and Fine off the calendar (App. B, pp. A-14, 16). The 1964 indictment was moved for trial and the four witnesses not having been sentenced testified on behalf of the Government. It is the contention of the petitioner that the failure to sentence the four above named individuals created a situation wherein the four witnesses were motivated to testify in a manner favorable and satisfactory to the government to obtain the good will of the government upon sentencing.

It is a custom which has existed in this country for a considerable period that the government, in the prosecution of criminal cases, gives consideration to witnesses who have assisted the government. "The witnesses concerned are aware that this is so; the jurors and general public are also

aware of this practice." *U.S.* v. *Aviles*, 274 F. 2d 179, 191 (2nd Cir. 1960).

It is an unfortunate fact that to a certain extent the practice of withholding sentencing is considered to be a necessary adjunct to efficient law enforcement. It is to the government's advantage to keep the sword of sentence hanging over the head of co-defendant witnesses until such time as they have finished testifying against those with whom they allegedly associated in a criminal venture. On the other hand, as time passes the co-defendant witness continues at liberty and commences to pick up the threads of the life which was disrupted by his prosecution and conviction. Is it not likely that such a witness would be prone to do anything which he feels would be reasonably calculated to inspire the gratitude of the U.S. Attorney and other representatives of the government? As time continues to pass, it would seem that such efforts to please might grow to unwarranted proportions. *Rule 32 of the Federal Rules of Criminal Procedure* provides in part, "Sentence shall be imposed without unreasonable delay." The aforesaid Rule has been construed to be pointed not only toward the interest of the prisoner, but toward the interest of society as well. *Pratt* v. *U.S.*, 102 F. 2d 275, 278 (D.C. Cir. 1939); Cf. *Berkowitz* v. *U.S.*, 90 F. 2d 881, 822 (8th Cir. 1937). A determination as to whether or not a delay in completing a prosecution by way of sentence amounts to an unconstitutional deprivation of the rights of the prisoner depends upon the circumstances. *Beavers* v. *Haubert*, 198 U.S. 77, 49 L. Ed. 950, 25 S. Ct. 573. Presumably, what would amount to an unreasonable delay tending to deprive the prisoner of his rights would also constitute an unreasonable delay from the standpoint of the general public.

The United States Supreme Court in the case of *Pollard* v. *U.S.*, 352 U.S. 354, 1 L. Ed. 2d 393, 77 S. Ct. 481 (1957) indicates that the delay must not be "purposeful or oppressive."

In requesting that co-defendant witnesses be sentenced prior to commencement of trial, petitioner sought to avoid an evil which courts have long recognized and over which they have expressed concern. In *People* v. *Hermens*, 5 Ill. 2d 277, 285, 125 N.E. 2d 500, 504 (1955) the Illinois Supreme Court stated with regard to a co-defendant witness:

> "It is . . . universally recognized that such testimony has inherent weaknesses, being testimony of a confessed criminal and fraught with dangers of motives such as malice toward the accused, fear, threats, promises or hopes of leniency, or benefits from the prosecution which must always be taken into consideration . . ."

See also:

Crawford v. *United States*, 212 U.S. 183, 204 (1909);
Outlaw v. *United States*, 81 F. 2d 805 (5th Cir. 1936), cert. denied, 298 U.S. 665 (1936);
Delvalley v. *United States*, 88 F. 2d 579 (7th Cir. 1937);
Hanks v. *United States*, 97 F. 2d (4th Cir. 1938).

The petitioner's request for a fair trial sought to avoid the over-cooperation and over-enthusiasm which co-defendant witness could be expected to offer to the prosecution in return for favorable consideration at sentencing.

4. On October 18, 1966, and simultaneously herewith a petition for a writ of certiorari was filed in behalf of co-defendant Seymour Salb. His petition presents and de-

velops the sole question as to whether it is permissible for a Federal judge to impose a more severe sentence upon a criminal defendant because he has exercised his constitutional right to enter a plea of not guilty and stand trial. Rather than burden this Court with a repetition of the argument made in behalf of Seymour Salb, petitioner herein adopts that argument in further support of the within petition.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

VAN RIPER & BELMONT
Attorneys for Petitioner

SHELDON LOWE
Of Counsel

October 18, 1966

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No: 436—September Term, 1965.

(Argued June 23, 1966 Decided August 4, 1966.)

Docket No. 30343

UNITED STATES OF AMERICA,

Appellee,

—v.—

CAESAR BOTTONE, SEYMOUR SALB, and NATHAN SHARFF,

Appellants.

Before:

MOORE, FRIENDLY and FEINBERG,

Circuit Judges.

Appeals from a judgment of the District Court for the Southern District of New York, Charles M. Metzner, *Judge,* convicting defendants, after a verdict, of interstate and foreign transportation of cultures and documents stolen, converted or taken by fraud in violation of 18 U. S. C. §2314, and of conspiring to do so in violation of 18 U. S. C. §371. Affirmed.

MOSES POLAKOFF, New York, N. Y. (Van Riper & Belmont, Newark, N. J.; Walter D. Van Riper, of Counsel; Theodore M. Wolkof, New York, N. Y., on brief), *for Defendants-Appellants Salb and Sharff.*

ALFRED DONATI, JR. (Zoloto, Karger & Zurkow, New York, N. Y.; Arthur Karger, of Counsel), *for Defendant-Appellant Bottone.*

DANIEL R. MURDOCK (Robert M. Morgenthau, United States Attorney for the Southern District of New York; John S. Martin, Jr., Stephen F. Williams, John E. Sprizzo, Assistant United States Attorneys), *for the United States of America.*

FRIENDLY, *Circuit Judge*:

The convictions here under appeal stem from a scheme for the massive extraction from Lederle Laboratories, a division of American Cyanamid Company located in Pearl River, N. Y., of microorganisms used in the production of three antibiotics and a steroid,[1] and instructions for the drugs' manufacture. Although the drugs were covered by patents and specimen cultures were required to be deposited in collections available for purchase by the public at minimal cost, improved strains of the microorganisms and detailed manufacturing processes developed by Lederle which

---

[1] The antibiotics were tetracycline (TC), sold as Achromycin; chlortetracycline (CTC), sold as Aureomycin; and demethychlortetracycline (DMCTC), sold as Declomycin. The steroid was triamcinolone, sold as Aristocort.

were not in the public domain offered vastly greater output from the same physical plant. The combination of this with the lack of patent protection in certain foreign countries created a market for stolen cultures and secret processes and furnished a substantial incentive for theft to disloyal employees and persons willing to do business with them. The enterprise that was the subject of this indictment involved stealing and preserving cultures Lederle had developed, temporarily removing and copying documents that outlined manufacturing procedures, and then selling the cultures and the copies primarily for ultimate exportation to Europe. As in so many criminal trials, the Government's case was presented mainly through the chief culprits, two former Lederle employees, Sidney Fox and John Cancelarich, and their lieutenant, Leonard Fine, all of whom pleaded guilty to the charges against them and were rewarded for their cooperation with light sentences of six months' imprisonment.[2] The serious crimes charged against the appellants, Salb, Sharff and Bottone, were on the receiving end.

The trial was in the District Court for the Southern District of New York before Judge Metzner and a jury. The counts submitted, on which appellants were found guilty and given two-year concurrent sentences, were in summary as follows:

---

[2] Joseph Gerace, a lesser accomplice, who also testified for the Govermnent, received a suspended sentence.

Number	*Charge*	*Appellants*
1	Transporting CTC cultures and related documents from Spring Valley, N. Y., to East Paterson, N. J., on November 11, 1959.	Salb Sharff
8	Transporting TC, CTC, DMCTC and triamcinolone cultures and related documents from New York to Rome, Italy, on April 16, 1961.	Bottone Salb Sharff
9	Transporting CTC culture from New York to Milan, Italy, on September 15, 1961.	Bottone Sharff
10	Conspiracy to steal, transport and sell cultures and related documents from March 1958 to July 1964.	Bottone Salb Sharff

Appellants' prolix briefs reargue the evidence in a manner that would scarcely be convincing to a jury and is wholly misplaced before an appellate court. Counsel ought to understand the futility of tedious efforts to show that each piece of testimony is susceptible of an innocent interpretation if it stood alone. The trier is entitled, in fact bound, to consider the evidence as a whole; and, in law as in life, the effect of this generally is much greater than of the sum of the parts. Cf. *United States* v. *Monica*, 295 F. 2d 400, 401-02 (2 Cir. 1961), cert. denied, 368 U. S. 953 (1962). Indeed we find simply frivolous the attempt to

demonstrate insufficiency by Salb and Sharff, who, as proprietors of Biorganic Laboratories of East Paterson, N. J., had begun illicit dealings with Fox in stolen Lederle cultures as early as the winter of 1958, continued their purchases of microorganisms and documents for more than two years, and then switched their custom to Cancelarich after he had acquired most of Fox' collection of Lederle cultures and records. Although Bottone entered the conspiracy at a later stage and the Government adduced no direct testimony that he had heard the cultures and documents described as stolen from Lederle, the evidence of his participation in discussions as to disposition of the goods and of his substantial role in facilitating transportation abroad of both cultures and participants, which we summarize in the margin,[3] amply met the Government's burden. To

---

[3] Bottone's first significant appearance was in June 1960 when Sharff and Salb were endeavoring to persuade Fox it would be dangerous for him to sell the stolen materials by himself. They placed a fake advertisement seeking information in a trade paper under the name of a Dr. Angelo Mancuso, with the address of Sharff's brother-in-law. Fox answered the ad and met in London with a business associate of Bottone, Salvetti, who masqueraded as Dr. Mancuso. Salvetti telephoned Bottone who was then in Italy and, saying he had just met with a group that had closed a big deal which he had to stop, asked Bottone to cable him in London that Interpol was investigating the theft of Lederle trade secrets. Bottone sent the cable, left for London in the middle of the night, and secretly observed Salvetti show the cable to Fox. Afterwards Salvetti told Bottone he wanted to stop Fox' deal so that he might offer the same information and microorganisms at a lower price. In March 1961 Bottone had a visit in Berlin with Wawretschek, head of a Milan pharmaceutical firm, Ankermann, which had been a purchaser of the stolen cultures and processes; Wawretschek complained about the quality of the microorgansims and suggested a new deal whereby Salb, Sharff, Salvetti and Bottone would buy into his company. Bottone telephoned this proposal to Salvetti in Rome; on April 10 the American group executed a purchase contract in New Jersey, with Salvetti signing in Bottone's behalf. On April 14 Fine and Salvetti drove Cancelarich from Salvetti's apartment in Bronxville, N. Y., to Biorganic to discuss Cancelarich's employment at Ankermann with Salb, Sharff and Bot-

hold that the jury could not be convinced from all this evidence of his comings and goings that Bottone knew what was about, would require a greater degree of credulity than even such "naif, simple-minded men" as appellate judges, see Holmes, Collected Legal Papers 295 (1920), can be expected to possess. And we are wholly unimpressed by the criticisms now made of the judge's summary of this evidence, to which counsel took no exception at the time. See *United States* v. *Kahaner*, 317 F. 2d 459, 478-79, 482 (2 Cir.), cert. denied, 375 U. S. 836 (1963).

The only serious point of law raised by appellants is whether the transportation of papers describing the Lederle processes constituted the transportation in interstate or foreign commerce of "any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converetd or taken by fraud."

---

tone. Cancelarich made a full revelation of his own thieveries and his possession of Fox' collection of Lederle cultures and processes, but it was not proved that this was heard by Bottone, who arrived late. Two days later Bottone drove Cancelarich from Fort Lee, N. J., to Kennedy Airport and bought him a ticket to Italy; Cancelarich carried stolen cultures and papers describing Lederle's processes. Bottone subsequently flew to Milan and in May introduced Cancelarich to a Dr. Marpurgo, representing a Milan firm called MIBA, who was interested in buying a DMCTC process. Cancelarich promised to furnish this for $60,000, which he agreed to split with Bottone who said he would split his share with Salvetti. The culture and processes furnished MIBA were stolen from Lederle. Somewhat later Bottone drove Fine, equipped with stolen Lederle cultures and documents destined for Ankermann, from New Jersey to Kennedy Airport and bought him a ticket to Italy. Fine and Marpurgo subsequently reported to Bottone's MIBA's success with the processes supplied by Cancelarich. In July Bottone financed a trip to Italy for Fine whom he asked to collect $2,000 of his share from Marpurgo. Finally, in September 1961 Bottone, at Sharff's request, took a CTC culture from New York to Milan for delivery to Wawretschek, telling him that the package contained strains coming from Fine.

18 U. S. C. §2314. The problem is not any doubt on our part that papers describing manufacturing procedures are goods, wares, or merchandise, as was held with respect to geophysical maps in *United States* v. *Seagraves*, 265 F. 2d 876 (3 Cir. 1959), and *United States* v. *Lester*, 282 F. 2d 750 (3 Cir. 1960), cert. denied, 364 U. S. 957 (1961). Neither do we have any concern over the value of these papers, since we dismiss out of hand the contentions that secret processes for which European drug manufacturers were willing to pay five and six figures and in whose illicit exploitation appellants eagerly invested a large portion of their time and an appreciable amount of their fortunes were not worth the $5,000 required to subject them to federal prosecution, see *United States* v. *Schaffer*, 266 F. 2d 435, 440 (2 Cir. 1959), aff'd, 362 U. S. 511 (1960), or that the judge committed any prejudicial error in his submission of that issue to the jury. If *Abbott* v. *United States*, 239 F. 2d 310, 312-13 (5 Cir. 1956) is to be considered as ruling out evidence of value in a thieves' market, we prefer the contrary Third Circuit holdings in *United States* v. *Seagraves, supra*, 265 F. 2d at 880, and *United States* v. *Lester, supra*, 282 F. 2d at 754-55. The serious question is whether, on the facts of this case, the papers showing Lederle processes that were transported in interstate or foreign commerce were "goods" which had been "stolen, converted or taken by fraud" in view of the lack of proof that any of the physical materials so transported came from Lederle's possession. The standard procedure was for Fox and Cancelarich to remove documents from Lederle's files at Pearl River, N. Y., take these to Fox' home within New York state, make photocopies, microfilms or

notes, and then restore the purloined papers to the files; only the copies and notes moved or were intended to move in interstate or foreign commerce. The case differs in this respect from the Third Circuit cases of *Seagraves* and *Lester* where, as the records on appeal show, the photostats and tracings delivered by the Gulf Oil geologist were the property of the company, having been made in the company's office, on its paper and with its equipment.

We are not persuaded, however, that a different result should obtain simply because the intangible information that was the purpose of the theft was transformed and embodied in a different physical object. To be sure, where no tangible objects were ever taken or transported, a court would be hard pressed to conclude that "goods" had been stolen and transported within the meaning of §2314; the statute would presumably not extend to the case where a carefully guarded secret formula was memorized, carried away in the recesses of a thievish mind and placed in writing only after a boundary had been crossed. The situation, however, is quite different where tangible goods are stolen and transported and the only obstacle to condemnation is a clever intermediate transcription or use of a photocopy machine. In such a case, when the physical form of the stolen goods is secondary in every respect to the matter recorded in them, the transformation of the information in the stolen papers into a tangible object never possessed by the original owner should be deemed immaterial. It would offend common sense to hold that these defendants fall outside the statute simply because, in efforts to avoid detection, their confederates were at pains to restore the

original papers to Lederle's files and transport only copies or notes, although an oversight would have brought them within it. We have been instructed to "free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule." *United States* v. *Dege*, 364 U. S. 51, 52 (1960) (Frankfurter, *J.*), quoting *United States* v. *Union Supply Co.*, 215 U. S. 50, 55 (1909) (Holmes, *J.*). See also *United States* v. *Sullivan*, 332 U. S. 689, 693-94 (1948); *United States* v. *Bramblett*, 348 U. S. 503, 509-10 (1955); *United States* v. *Turley*, 352 U. S. 407, 412-13 (1957). Such considerations have particular force when, as here, the defendants could not have doubted the criminal nature of their conduct, and the sole issue is whether they subjected themselves to punishment by the United States as well as by a state.

Alternatively, we accept the Government's suggestion that the judgment may stand even if the statute does not reach far enough to include the copies and notes. Each count included and the evidence showed the transportation of cultures which were stolen "goods" on any view. The problem whether the copies and notes of Lederle documents were also within the statute arises only because substantive counts 1 and 8 and conspiracy count 10 charged the transportation both of cultures and of documents and the jury made no finding that the cultures alone were worth $5,000, although it would have been quite justified in doing so. But, says the Government, count 9 charged only transportation of a stolen CTC culture which the jury necessarily found worth the statutory minimum in convicting Sharff and Bottone and in view of the concurrent sentences we need not go further as to them. And Salb's conviction

should also stand since the transportation of the culture charged in count 9 was in furtherance of the conspiracy alleged in count 10 and the journey was one of the overt acts. In accepting this argument here we would not wish to be understood as giving all-out obeisance to the validation of concurrent sentences by the presence of one or more good counts, see *Lawn* v. *United States*, 355 U. S. 339, 359-62 (1958); despite frequent reliance on this principle where appropriate, we adhere to Judge Clark's statement that we will reverse for a material error on another count "whenever the nature of the error committed below or other circumstances suggest that the accused might have received a longer sentence than otherwise would have been imposed, or that he has been prejudiced by the results of the proceedings." *United States* v. *Hines*, 256 F. 2d 561, 563 (2 Cir. 1958); cf. *United States* v. *Barash*, —— F. 2d ——, —— (2 Cir. 1966). But this is not such a case. The error —if there was one—went only to including the papers in the determination of value under counts 1, 8 and, by reference, the conspiracy count, and, as said in *United States* v. *Schaffer, supra*, 266 F. 2d at 440:

> "The only reason for the $5,000 limitation is to avoid overtaxing the Department of Justice. There is no legitimate interest of [defendants] . . . which the Congress sought to protect by this requirement."

We have not the slightest question that the jury would have properly convicted on all counts if only the transportation of cultures had been charged, and the papers had been relied on simply as demonstrating the scope of the criminal enterprise and as enhancing the value of the microorgan-

isms. Judge Metzner's remarks on imposing sentence show that he viewed defendants' activities as a whole, and the two-year concurrent sentences were modest as compared to the permitted maximum of ten years imprisonment, a $10,000 fine, or both, on each substantive count, 18 U. S. C. §2314, or the five years imprisonment, $10,000 fine or both, on the conspiracy count, 18 U. S. C. §371.

The only other point meriting discussion, and that somewhat questionably, is Bottone's objection to the Government's being allowed to use a deposition and a memorandum of further interrogatoin in a civil action. Merck & Co. had obtained a consent judgment of $100,000 in the District Court for New Jersey against Bottone for infringement of its patent on Vitamin B-12. In May 1962 it entered into an agreement, amended a month later, whereby it would accept $15,000 in satisfaction of the judgment if Bottone would give a "frank and complete disclosure in depositions under oath of all matters and things" within his knowledge on a specified list of subjects. Bottone claims that government investigation had "focused" upon him before the bulk of the interrogation, see *Escobedo* v. *Illinois*, 378 U. S. 478, 490 (1964), that his answers were extracted by pressure and subterfuge on the part of Merck's New Jersey attorney who also represented American Cyanamid in that state, and that much of the interrogation was conducted without Bottone's counsel being present. Therefore, he insists, use of his answers at trial should have been barred as in violation of Fifth and Sixth Amendment rights, or that at least he should have been given a hearing to prove that Merck's lawyer was acting in part at the Government's behest.

Putting to one side the Government's substantial claims that these points were not sufficiently raised below, we find them wholly without merit. In no conceivable way was Bottone "compelled . . . to be a witness against himself." He freely consented to the interrogation, for his own benefit, to rid himself of a liability for $85,000; if the questioning touched on matters tending to incriminate him, he was free to claim the privilege on penalty only of foregoing the financial advantages that performing his agreement to talk would entail. Since he was not in custody, the rules laid down in *Miranda* v. *Arizona*, —— U. S. —— (1966), have no application even if Merck's attorney were working with the Government—quite apart from this having been a pre-*Miranda* trial. See *Johnson* v. *New Jersey*, —— U. S. —— (1966). In any event, not only is it fairly inferable that Bottone had the advice of counsel when he signed the agreement with Merck but a lawyer was present during half the civil interrogation and there was nothing to prevent one from assisting throughout if Bottone had wished. Moreover, in contrast to *Massiah* v. *United States*, 377 U. S. 201 (1964), no "criminal prosecution" against Bottone had been commenced at the time of the questioning, and *Miranda* appears to teach that the references in *Escobedo* v. *Illinois, supra*, to the need for counsel in the period prior to initiation of the criminal process were solely concerned with the need for a lawyer to counteract the coercion thought to be inherent in in-custody interrogation.

Affirmed.

APPENDIX B

Docket Entries

(A) CRIMINAL DOCKET

UNITED STATES DISTRICT COURT

62 Cr 963

THE UNITED STATES

vs.

1. SIDNEY MARTIN FOX—Cts. 1, 2, 3, & 5
2. ELIO SALVETTI—Cts. 1, 2, 3, 4 & 5
3. NICOLO VISCONTI diMADRONE—Cts. 1 & 5
4. NATHAN SHARFF—Cts. 4 & 5
5. CAESAR BOTTONE—Cts. 4 & 5
6. JOSEPH GERACE—Cts. 4 & 5
7. JOHN CANCELARICH—Cts. 1, 2, 3, 4 & 5
8. LEONARD HOWARD FINE—Cts. 1, 2, 3, 4 & 5

T. 18, Secs. 2314 & 2, U.S. Code.
Unlawfully transporting foreign commerce drug and valued at $5,000., and more, knowing the same to have been stolen.
(Cts. 1 to 4, inclusive.)

T. 18, Sec. 371, U.S. Code
Conspiracy so to do.
(Total—Five Counts)

* * * * *

Docket Entries

DATE	PROCEEDINGS
12-28-64	John Cancelarich Leonard Howard Fine Joseph Gerace Case Marked Off Calendar. Tyler, J.

• • • • •

Docket Entries

(A) UNITED STATES DISTRICT COURT

CRIMINAL DOCKET

64 Cr 648

THE UNITED STATES

vs.

Caesar Bottone—Cts. 8, 9 & 10

John Cancelarich—Cts. 6 & 8

Leonard Fine—Cts. 6 & 8

Sidney Martin Fox—Cts. 1, 2, 3, 4, 5, 6, 7, 10 & 11

Maurice Rosenblatt—Cts. 2 & 3

Seymour Salb—Cts. 1, 8, 9 & 10

Elio Salvetti—Cts. 4, 5, 6, 7, 8, 9 & 10

Nathan Sharff—Cts. 1, 8, 9 & 10

Nicolo Visconti diMadrone—Cts. 4, 5 & 7

T. 18, Secs. 2314 & 2, U.S. Code

Unlawfully transporting & causing to be transported in interstate commerce (Cts. 1 & 11) and in foreign commerce (Cts. 2, 4, 5, 6, 8 & 9) drugs of a value of $5,000., and more & documents relating to the production of said drugs, knowing the same to have been stolen, converted & taken by fraud.

Docket Entries

T. 18, Sec. 371, U.S. Code.

Unlawfully conspiring to violate Sections 2314 & 2315, Title 18, U.S. Code. (Cts. 3, 7 & 10).

(Total—Eleven Counts)

• • • • •

DATE	PROCEEDINGS
(B)	
12-15-65	Sidney Martin Fox—Case marked off calendar. Tyler, J.
10-1-65	Nathan Sharff) Seymour Salb)—Filed notice of motion for an order directing that sent. be imposed upon John Cancelarich, Leonard Fine, Joseph Gerace, and Sidney Martin Fox forthwith & before the trial of the indictment herein, or, in the alternative, an Order directing that testimony of Cancelarich, Fine, Gerace & Fox be suppressed & that the said individual be prohibited from testifying on behalf of the Gov't or any deft. in the trial of the indictment herein.

• • • • •

11-9-65	Nathan Sharff) Seymour Salb)—Filed Memorandum #31791—Cannella, D.J.—"Motion by defendants Sharff and Salb, to compel the court to impose sentence on co-defendants Cancelarich, Fine, Ger-

DATE	PROCEEDINGS
	ace and Fox, before trial of indictment herein, or in the alternative that said co-defendants be prohibited from testifying on behalf of the government or any defendant at the trial and that their testimony be suppressed, is denied. * * * So ordered. 11/5/65 Cannella, D.J." (See Memorandum and Order) (Mailed notice on 11/10/65)
	* * * * *

APPENDIX C

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourth day of August one thousand nine hundred and sixty-six.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. WILFRED FEINBERG,

Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Caesar Bottone, Seymour Salb and Nathan Sharff,

Defendants-Appellants,

John Cancelarich, Leonard Fine, Sidney Martin Fox, Maurice Rosenblatt, Elio Salvetti, and Nicolo Visconti di Madrone,

Defendants.

Appeal from the United States District Court for the Southern District of New York.

Appendix C—Judgment of the United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

By /s/ VINCENT A. CARLIN
Chief Deputy Clerk

APPENDIX D

Order Denying Petition for Rehearing, etc.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of September, one thousand nine hundred and sixty-six.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. WILFRED FEINBERG,
Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Cäesar Bottone, Seymour Salb and Nathan Sharff,

Defendants-Appellants,

John Cancelarich, Leonard Fine, Sidney Martin Fox, Maurice Rosenblatt, Elio Salvetti, and Nicolo Visconti diMadrone,

Defendants.

A petition for a rehearing together with a motion to stay the issuance of the mandate pending a petition for writ of

certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellants Seymour Salb and Nathan Sharff,

Upon consideration thereof, it is

Ordered that said petition for rehearing be and it hereby is denied.

Further ordered that the issuance of the mandate be and it hereby is stayed subject to Rule 28(c) of the rules of this court.

/s/ A. Daniel Fusaro
Clerk

APPENDIX E

Order Denying Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twentieth day of September, one thousand nine hundred and sixty-six.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,

Circuit Judges.

United States of America,

Plaintiff-Appellee,

v.

Caesar Bottone, Seymour Salb and Nathan Sharff,

Defendants-Appellants,

John Cancelarich, Leonard Fine, Sidney Martin Fox, Maurice Rosenblatt, Elio Salvetti, and Nicolo Visconti diMadrone,

Defendants.

Appendix E—Order Denying Petition for Rehearing In Banc

A petition for a rehearing in banc having been filed herein by counsel for the appellants Seymour Salb and Nathan Sharff,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. Daniel Fusaro
Clerk